Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

CARL LOCHMAN; ELAINE LOCHMAN,
individually and on behalf of
KELLI LOCHMAN AND KYLE LOCHMAN,

Petitioners,

vs.

COUNTY OF CHARLEVOIX, Jointly and Severally;
and PHILO SUMNER, Jointly and Severally,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. § 1983, which is generally and presumptively available as a remedy for claimed violations of federal statutory law, allows the petitioners to maintain this action based on a clear, unexcused violation of 33 U.S.C. § 403?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 3, 1996 in order to redress the clear error of the lower courts.

OPINIONS BELOW

The relevant opinion and orders are reproduced in the Appendix beginning at p. 1a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

This petition is filed within 90 days of the Court of Appeals' Opinion Affirming the District Court dated September 3, 1996.

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

33 U.S.C. § 403, the Federal Statute allegedly violated by the Defendants provides as follows:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

STATEMENT OF THE CASE

This case involves a tragic diving injury to twelve-year-old Kelli Lochman. She suffered paralyzing injuries when her head struck the lake bottom following a dive. Whiting Park is a Charlevoix County, Michigan public park located on Lake Charlevoix, a navigable waterway. On July 9, 1993, the Defendant, Philo Sumner, who was the Manager of Whiting Park and an executive policy maker, moved the L-shaped diving dock from waters which were at its deepest diving end over five (5') deep, into more shallow waters near a sand bar, which were approximately three and one-half (3½') feet deep. This move was done without the required federal permit pursuant to 33 U.S.C. § 403, which requires approval by the Army Corps of Engineers of any movement structures in navigable waterways.

Pursuant to federal regulations, if a permit was requested, notice of a period of public comment would be provided of the proposed obstruction to navigable waters or movement of same, so that interested persons, such as users of the dock, would be afforded a chance to express their disapproval.

If the Army Corps of Engineers, based on the public comment provided and their own analysis, determined that members of the public may be harmed from an unsafe diving dock, no permit would have been issued.

Petitioners adopt the "Factual Background" contained in the District Court Opinion, or this Petition:

The facts upon which this decision is based are undisputed. Whiting Park is a county park operated by

the County of Charlevoix. Defendant Philo Sumner is the manager of Whiting Park, a position he has held since approximately 1977. The park is open to the public free of charge for use of the beach and recreational facilities. The dock involved in the incident was built in 1977 or 1978 by Mr. Sumner to replace an identical dock which had been in place since the 1950's. Each year, Mr. Sumner would place the dock in relatively the same location where the depth of the water was approximately five feet deep. The dock was made up of twelve foot sections which locked together. The dock was one hundred twenty feet long and thirty five and one-half wide and was shaped like an "L".

The Boyne City Swim School program, a community swim program organized by parents of the community, made use of the dock each year. Bardel Belford, the swim program instructor, would contact Mr. Sumner at the beginning of the summer to inform him when the dock would be needed for the program. Except for the hours when the swim classes were being conducted, the dock was open for public use. Mr. Sumner stated that the dock had been used for diving by both children and adults for many years.

At the beginning of the 1993 swim season, Ms. Belford asked one of her students, Nissa Ryder, to enter the water at the end of the dock to check the depth of the water. In the original location of the dock, the water measured approximately four and one half to five feet deep, a level safe for diving.

On July 9, 1993, Belford arrived at the Park to conduct swim class and observed the dock being moved by two employees of the Park. Mr. Sumner had requested

that the dock be moved because the beach was eroding from the front of the dock, requiring people using the dock to step from the beach into the water and onto the dock. Upon seeing the dock moved, Ms. Belford voiced her concern to Mr. Sumner that the water in the new location would be too shallow for diving. Mr. Sumner responded with his concern that having people step from the water onto the dock would make the dock unnecessarily slippery.

Ms. Belford asked Nissa Ryder to check the depth of the water at the end of the dock in the new location. Ms. Belford determined that the water at the end of the dock was too shallow for diving; the water only reached shoulder level on Nissa Ryder, who was approximately four feet five inches tall. Mr. Belford indicated that she would not have noticed that the dock had been moved had she not seen the workers moving it. Ms. Belford informed Mr. Sumner that the dock was no longer safe for diving in the new location. She asked Mr. Sumner to either extend the dock from the "L-shape" to a straight configuration into deeper water, or to place a warning sign that the dock had been moved. Mr. Sumner declined to do either. He was concerned that people running on the dock with wet feet might slip and injure themselves.

Mr. Sumner concedes that the depth of the Lake was variable due to the presence of sand bars. Mr. Sumner never made any study regarding the location of the dock with regard to the location of the sand bars and failed to check the depth at the end of the dock in its new location. Mr. Sumner did not obtain permission from the Army Corp of Engineers to place or move the dock in violation of 33 U.S.C. § 403 of the Navigable Waters Act.

In the afternoon of July 9, 1993, Kelli Lochman, age 12, and her older brother Kyle were swimming at Whiting Park. Kelli jumped or dove off from the dock and allegedly struck her head on the lake bottom. Kelli sustained a cervical spinal cord injury, rendering her a quadriplegic. The Lochmans had been to the Park in previous years, but July 9 was the first day Kelli and Kyle had gone swimming at the Park in 1993.

(pp. 16a-18a)

The Federal District Court ruled that no cause of action was stated:

> "Given that the Supreme Court in *Sierra Club* explicitly determined that potentially harmed plaintiffs were not the intended beneficiaries of the statute, plaintiffs' argument seems to be just the result the Supreme Court rejected. This Court does not believe that Congress or the Supreme Court intended that any member of the general public that is harmed in some way by a structure on a navigable waterway becomes the intended beneficiary of 33 U.S.C. Sec. 403. Defendants' motion for summary judgment on Count I of plaintiffs' complaint will, therefore, be granted.

(p. 21a)

The Sixth Circuit Court of Appeals adopted this reasoning in concluding the District Court was correct:

> "Having conducted the required *de novo* review of an order granting summary judgment, we find that the plaintiffs failed to demonstrate the existence of a genuine issue of material fact, and that the Defendants were entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

> Accordingly, the judgment of the district court is AFFIRMED."
>
> (p. 14a)

This Petition timely follows from that published Opinion.

REASONS FOR GRANTING THE WRIT

42 U.S.C. § 1983, which is generally and presumptively available as a remedy for claimed violations of federal statutory law, allows the petitioners to maintain this action based on a clear, unexcused violation of 33 U.S.C. § 403.

In *Maine v. Thiboulot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), this Court unequivocally accepted what had been earlier implied that *42 U.S.C. § 1983* could be used to bring an independent action for violation of federal statutes. The United States Supreme Court relied on the language "and laws" in upholding a cause of action based on the Social Security Act.

In *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), this Court explained the relevant test in determining whether a *42 U.S.C. § 1983* cause of action was stated for violation of federal statutory rights.

> Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution or laws" of the United States. In *Maine v. Thiboulot, supra,* we held that Section 1983 provides a cause of action for violations of federal statutes as well

as the Constitution. We have recognized two exceptions to this rule. A Plaintiff alleging a violation of a federal statute will be permitted to sue under Section 1983 unless (1) "the statute [does] not create enforceable rights, privileges, or immunities within the meaning of Section 1983," or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 107 S.Ct. 766, 770, 93 L.Ed.2d 781 (1987). Petitioners argue first that the Boren Amendment does not create any "enforceable rights" and second, that Congress had foreclosed enforcement of the action under Section 1983. We address these contentions in turn.

"Section 1983 speaks in terms of *'rights'*, privileges, or immunities,' not violations of federal law." *Golden State Transit Corp v. Los Angeles*, 493 U.S. 103, 106, 120 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989) (emphasis added). We must therefore determine whether the Boren Amendment creates a "federal right" that is enforceable under Section 1983. Such an inquiry turns on whether "the provision in question was intend[ed] to benefit the putative Plaintiff." *Ibid.* If so, the provision creates an enforceable right unless it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19, 101 S.Ct. at 774). Under this test, we conclude that the Act creates a right enforceable by health care providers under Section 1983 to the adoption of reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operating facility

> that provides care to Medicaid patients. The right is not merely a procedural one that rates be accompanied by findings and assurances (however perfunctory) of reasonableness and adequacy; rather the Act provides a substantive right to reasonable and adequate rates as well.
>
> (496 U.S. at 508-510, 110 S.Ct. at 2547-49)

More recently, in *Livadas v. Bradshaw*, 512 U.S. ___, 114 S.Ct. 2083, 129 L.Ed.2d 93 (1994), the United States Supreme Court indicated that "apart from exceptional cases, Section 1983 remains **a generally and presumptively available remedy for claimed violations of federal law.**"

Of course, in determining whether a *42 U.S.C. § 1983* cause of action exists, the inquiry is different than determining whether a private right of action can be implied. This separate test was not fully distinguished by the lower courts:

> **This is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.** See *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). In implied right of action cases, we employ the four-factor *Cort* test to determine "whether Congress intended to create the private remedy asserted" for the violation of statutory rights. See *Transamerican Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 100 S.Ct. 242, 245-246, 62 L.Ed.2d 146 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576, 99 S.Ct. 2479, 2488-2489, 61 L.Ed.2d 82 (1979). The test reflects a concern, grounded in separation of powers, that Congress rather than the courts

> controls the availability of remedies for violations of statutes. See e.g. *Thompson v. Thompson*, 484 U.S. 174, 191-192, 108 S.Ct. 513, 5-22-523, 98 L.Ed.2d 512 (1988); *Cannon v. University of Chicago*, 441 U.S. 677, 742-749, 99 S.Ct. 1946, 1981-1985, 60 L.Ed.2d 560 (1979). Because Section 1983 provides an "alternative source of express Congressional authorization of private suits," *Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19, 101 S.Ct. 2615, 1625, 69 L.Ed.2d 435 (1981), these separation-of-powers concerns are not present in a Section 1983 case. Consistent with this view, we recognize an exception to the general rule that Section 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy. See *Golden State Transit Corp. v. Los Angeles, supra, Wright v. Roanoke Redevelopment and Housing Authority, supra.*
>
> (*Wilder v. Virginia Hospital Assn.*, 496 U.S. at 508, fn. 9, 110 S.Ct. 1417 fn. 9 (emphasis added))

Consequently, because there is no direct cause of action under *33 U.S.C. § 403*, it is *more likely* that Plaintiffs' rights would be enforced pursuant to a *42 U.S.C. § 1983* cause of action.

In ruling that the Petitioners did not state a cause of action, the Lower Courts relied principally on *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775 (1981). Petitioners respectfully submit that *California v. Sierra Club, supra,* is not dispositive as that case (1) arose in the context of a direct cause of action pursuant to *33 U.S.C. § 403* and a different test is involved for cases brought under *42*

U.S.C. § 1983; (2) the test of an implied cause of action utilized in *California v. Sierra Club, supra,* has been superseded by *Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 204, 106 S.Ct. 3229 n.9, 92 L.Ed.2d 650 (1986), which emphasizes the Congressional intent; (3) the Opinion of Justice White in *California v. Sierra Club, supra,* was not joined by any other justice as to whether a special benefit was attempted to be granted pursuant to *33 U.S.C. § 403*; (4) the body of federal regulations promulgated by the Army Corp of Engineers is centered on a "public benefit analysis" which focuses on benefits to the public at large with an opportunity for the public to express their opinion on proposed navigable obstructions.

The concurring Opinion of Justice Stevens proves that the intent of *33 U.S.C. § 403* was to create public rights.

> In 1988 this Court reversed a decree enjoining the construction of a bridge over a navigable river. *Willamett Iron Bridge Co. v. Hatch,* 125 U.S. 1, 8 S.Ct. 811, 31 L.Ed.2d 629. The Court's opinion in that case did not question the rights of the private parties to seek relief in a federal court; rather, the Court held that no federal rule of law prohibited the obstruction of the navigable waterway. Congress responded to the *Willamette* case in the Rivers and Harbors Act of 1890 by creating a federal prohibition of such obstructions absent a permit from the Secretary of War, 26 Stat. 426, 454. At the time the statute was enacted, I believe the lawyers in Congress simply assumed that private parties in a position comparable to that of the litigants in the *Willamette* case would have a remedy for any injury suffered by reason of a violation of the new

> federal statute. For at that time the implication of private causes of action was a well-known practice at common law and in American courts. Therefore, in my view, the Members of Congress merely assumed that the federal courts would follow the ancient maxim "ubi jus, ibi remedium" and imply a private right of action. See *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40, 36 S.Ct. 482, 60 L.Ed. 874. Accordingly, if I were writing on a clean slate, I would hold that an implied remedy is available to respondents under this statute.
>
> (footnotes omitted, 451 U.S. 298-302)

Of course under the post *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) test, the focus is almost exclusively on Congressional intent, *Merrell Dow Pharmaceutical v. Thompson, supra*).

Of special note, is the Sixth Circuit's decision of *Norfolk & Western Co. v. United States of America*, 641 F.2d 1201 (6th Cir. 1980). In *Norfolk*, it was held that there was a private cause of action pursuant to *33 U.S.C. § 403*. While this specific holding is not good law in the fact of *California v. Sierra Club, supra*, it is noteworthy that *Norfolk* certainly indicated that persons harmed by failure to comply with the statute would be the intended beneficiaries of the statute. This is unambiguous support of the theory that rights have been created pursuant to this statute.

The Sixth Circuit's Opinion is inconsistent with other decisions of that Circuit. For instance, in *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 658 (6th Cir. 1994) specifically held that the Juvenile Justice Act constituted a

deprivation of right, privilege and immunity which would be enforceable under a *42 U.S.C. § 1983* cause of action. In their holding the Sixth Circuit in *Horn* emphasized that the provisions in the act were specific and mandatory as in *33 U.S.C. § 403.*

Similarly, in *Audette v. Sullivan,* 19 F.3d 254, 256 (6th Cir. 1994) the Sixth Circuit stressed that the federal statute must impose an obligation on the state actors and not only on federal officials. Likewise, in *Wood v. Thompkins,* 33 F.3d 600, 605-607 (6th Cir. 1994), this Circuit upheld a *42 U.S.C. § 1983* action based on the Medicaid statute. Importantly, the *Wood* Court ruled that the defendant would **have the burden of proving that no cause of action for violation of statute could be brought.**

Even in *California v. Sierra Club, supra,* in rejecting a private cause of action, Justice White in his Opinion did indicate that the legislative history supports the view that "the act was designed to benefit the public at large by empowering the federal government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures." 451 U.S. at 295, 101 S.Ct. at 1780.

The undeniable fact that the Army Corp of Engineers is attempting to enforce *42 U.S.C. § 403* to benefit the public with public input cannot be overlooked. Relevant are the general regulatory policies promulgated by the Corp of Army Engineers pursuant to *33 U.S.C. § 403.*

(a) *Regulatory approach of the Corp of Engineers.*
(1) The U.S. Army Corp of Engineers has been involved in regulating certain activities in the

> nation's waters since 1890. Until 1968, the primary thrust of the Corp regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest review." The program is one which reflects the national concerns for both the protections and utilization of important resources.
>
> (33 C.F.R. 320.1)

Also, very relevant regarding the regulations of the Army Corp of Engineers is the requirement of a public hearing as mandated by 33 C.F.R. § 327.9.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

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No. 95-1930

UNIED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL LOCHMAN; ELAINE LOCHMAN, Individually and on behalf of Kelli Lochman and Kyle Lochman,	)	ON APPEAL from the United State District Court for the Western District of Michigan
Plaintiffs-Appellants,	)	
v.	)	
COUNTY OF CHARLEVOIX, Jointly and Severally; and PHILO SUMNER, Jointly and Severally,	)	
Defendants-Appellees.	)	

Decided and Filed September 3, 1996

Before: LIVELY, KENNEDY, and SILER, Circuit Judges.

LIVELY, Circuit Judge. This case arose out of a tragic accident in which a 12-year-old girl suffered serious and permanent injuries while diving into a lake in a public

park from a pier or dock owned by Charlevoix County, Michigan. The single legal issue is whether a federal statute, section 10 of the Rivers and Harbors Appropriation Act of 1899 (the Act), 33 U.S.C. § 403 (1988), created a "right" that is enforceable in an action brought pursuant to 42 U.S.C. § 1983.

I.

A.

The facts are undisputed. Whiting Park is a county park located in and operated by Charlevoix County. The park offers beach and recreational facilities to the public free of charge. The beach facility includes several docks. One of the docks, known as the "T dock" or the "L dock," was used for diving by both children and adults for many years prior to 1993. The defendant, Philo Sumner, the manager of Whiting Park, built the dock at issue sometime in 1977 or 1978 to replace a similar dock that had been at the park since the 1950s.

Historically, each fall Mr. Sumner removed the dock from the lake to store it for the winter, and each spring he placed the dock back in the lake at its traditional location. Following his usual practice, sometime in May 1993, Mr. Sumner took the dock from storage and placed it in its usual location, where the water was at least 4½ to 5 feet deep, a depth safe for diving. The dock remained in that position without incident throughout June and early July.

On the morning of July 9, 1993, an instructor from the Boyne City Swim School, a community swim program that made use of the beach facility for swimming and

diving lessons, arrived at the park before time for her class and noticed two park employees moving the dock from its traditional location to an area of shallower water. The instructor sought out Mr. Sumner and voiced her concern that the new location would be unsafe for diving. Mr. Sumner stated that he had instructed the park employees to move the dock due to beach erosion at the dock's old location, which forced swimmers to step into the water before stepping onto the dock. Mr. Sumner indicated he was concerned that having people step from the water onto the dock would make the dock unnecessarily slippery and potentially dangerous. After confirming that the water at the end of the dock was less than 4½ feet deep, a dangerous depth for diving, the instructor requested that Mr. Sumner either lengthen the dock or place a warning sign to alert divers of the potential danger of diving into the shallow water. He declined to do either. Later that day, Kelli Lochman dove off the end of the dock, struck her head on the shallow bottom, and sustained severe injuries to her cervical spine, which rendered her quadriplegic.

B.

In February 1995, the Lochmans filed a multi-count complaint for damages. In Count I of their complaint, the Lochmans brought an action under § 1983 against Mr. Sumner and Charlevoix County based on an alleged violation of the Act. The remaining counts contained due process claims under § 1983 and various pendent state law claims. Only the § 1983 claim based on alleged violation of § 10 of the Act is before us on appeal.

Section 10 of the Act, 33 U.S.C. § 403, relied upon by the plaintiffs, prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. . . ." In addition, the statute makes it unlawful to build any wharf, pier or similar structure in navigable waters without obtaining approval of the Corps of Engineers acting for the Secretary of the Army. The park lake is an arm of Lake Charlevoix, a navigable body of water. The county conceded that it did not obtain the permission or approval of the Army Corps of Engineers before moving the dock to shallower water in 1993.

The defendants filed a motion for summary judgment, arguing that there is no right of action under § 1983 for the alleged violation of § 10 of the Act. After reviewing the parties' arguments in light of Supreme Court precedents, the district court granted summary judgment on all federal claims and declined to exercise supplemental jurisdiction over the state law claims, dismissing them without prejudice.

II.

In granting summary judgment on Count I, the district court relied principally on *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) and *California v. Sierra Club*, 451 U.S. 287 (1981), after first noting that in *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Supreme Court held that § 1983 provides a remedy for violations of federal statutes as well as for violations of the Constitution.

A.

In *Wilder*, a group of private hospitals sued the governor of Virginia and other state officials under § 1983 to challenge the method by which the State was reimbursing health care providers under the Medicaid Act, 42 U.S.C. § 1396. The Court stated that there are two exceptions to the *Thiboutot* holding that § 1983 is an available remedy for injuries caused by violation of a federal statute. The first exception is that there can be no § 1983 action if the statute does not create "enforceable rights, privileges, or immunities within the meaning of § 1983." The second exception applies if "Congress has foreclosed such enforcement of the statute in the enactment itself." *Id.* at 508 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987)). The presence of either exception forecloses a § 1983 claim based on an alleged statutory violation. *Cline v. Rogers*, 87 F.3d 176, 182-83, n.5 (6th Cir.1996). In *Wilder*, 496 U.S. at 508, the Court listed the exceptions in the disjunctive.

In determining whether the first exception applies, that is, whether a particular statute creates a "federal right" that is enforceable under § 1983, a court's inquiry "turns on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.' " *Id.* at 509 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)). If the provision in question was intended to benefit one in the plaintiff's position, it creates an enforceable right and the first exception does not apply. The inquiry with respect to the second exception is whether the administrative remedial measures provided in a given statute are " 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy

of suits under § 1983.' " *Id.* at 521 (quoting *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)).

The *Wilder* Court, 496 U.S. at 509, prescribed a three-part test for determining whether the first exception applies. We stated the test as follows in *Wood v. Tompkins*, 33 F.3d 600 (6th Cir.1994):

> To determine whether the first of these two exceptions applies, the Court has developed a three part test:
>
> (1) Was the provision in question intended to benefit the plaintiff?
>
> (2) Does the statutory provision in question create binding obligations on the defendant governmental unit, rather than merely expressing a congressional preference? and
>
> (3) Is the interest the plaintiff asserts specific enough to be enforced judicially, rather than being "vague and amorphous"?

Id. at 604-05. All three questions must be answered affirmatively to demonstrate the existence of a remedy under § 1983. Significantly, we held in *Wood* that "[t]he plaintiff bears the burden of proving that this exception does not apply." *Id.* at 605.

B.

In *Sierra Club*, the Supreme Court held that Congress did not create a private right of action, either explicitly or by implication, on behalf of persons claiming to have

been injured by alleged violations of 33 U.S.C. § 403. The Court stated that the "ultimate issue is whether Congress intended to create a private right of action" in the statute. 451 U.S. at 293. This intent is to be discerned by applying the four factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975), "for determining whether a private right of action should be implied from a federal statute. . . . " *Id.* at 292 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 26 (1979) (White, J., dissenting)).

The first of the four *Cort* factors is "whether the plaintiff is a member of a class for 'whose *especial* benefit the statute was enacted.' " *Id.* at 293 (quoting *Cort*, 422 U.S. at 78, 80-82). The Court cautioned that "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *Id.* at 294. After reviewing the language of the Act and its legislative history, the Court concluded that Congress' intention in enacting § 10 was to give the Secretary of War (now the Secretary of the Army) authority to take action with respect to obstructions and nuisances in navigable waters. "Congress was not concerned with the rights of individuals." *Id.* at 295.

The Court then considered the second *Cort* factor, whether Congress intended to create a private remedy for violation of the Act. "[T]he focus of the inquiry is on whether Congress intended to create a remedy." *Id.* at 297. After considering the Act's language and the legislative history, the Court concluded that Congress did not intend to provide a private remedy.

Having found that analysis under the first two *Cort* factors indicated no congressional intent to confer federal

rights on the Sierra Club and other plaintiffs in the case, or to provide a private remedy for violations of § 10 of the Act, the Court found it unnecessary to consider the remaining *Cort* factors. These remaining factors, whether the purpose of the statute would be advanced by implying a private action and whether such a remedy is within the federal domain interest, "are only of relevance if the first two factors give indication of congressional intent to create the remedy." *Id.* at 298.

III.

A.

The plaintiffs argue that *California v. Sierra Club* is not dispositive of their claim. They contend that because *Sierra Club* involved a direct action under § 10 rather than an action under § 1983 for violation of § 10, a different approach is required.

The *Wilder* Court stated, as the plaintiffs point out, that there is a different inquiry when a court is seeking to determine whether a private right of action can be implied from a particular statute and when it seeks to determine whether a statute creates enforceable rights under § 1983. *Wilder,* 496 U.S. at 509 n.9. Given the Supreme Court's reluctance to find " 'that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right" *id.* at 520 (quoting *Smith v. Robinson,* 468 U.S. 992, 1012 (1984)), the plaintiffs argue that there is no basis for holding that § 1983 does not provide a remedy for violation of § 10. Rather, the plaintiffs contend, § 10 was designed to protect all persons using the lake who are affected by a

structure such as the dock that was moved without the required authorization. According to the plaintiffs, the very fact that there is no direct action available to a person injured by such a violation strengthens their claim that § 1983 provides a remedy.

B.

The defendants assert that both exceptions to the *Thiboutot* rule apply to § 10. In the first place, they maintain that the statute does not create enforceable rights, privileges or immunities within the meaning of § 1983. They reach this conclusion on the basis of the first question in the three-part test outlined in *Wilder* and followed by this court in *Wood*.

The first question under *Wilder* is whether Congress intended to confer a benefit on persons with claims such as those of the plaintiffs in enacting § 10. This is essentially the same as the first inquiry under *Cort*, according to the defendants. Concededly, the inquiry in a case when a plaintiff claims a right to proceed under § 1983 for an alleged violation of a federal statute is directed to determination of whether Congress created a right, privilege or immunity rather than a determination of whether Congress created a cause of action by implication. Nevertheless, the first test for making the determination is the same in both cases: Did Congress intend to confer a benefit on the plaintiff? The Supreme Court answered this question in *Sierra Club*, say the defendants, by finding that Congress did not intend to afford a private right of action for persons injured by an alleged violation of § 10.

With respect to the second exception to *Thiboutot*, the defendants argue that a review of the entire Act demonstrates that Congress provided the type of comprehensive enforcement mechanism for the prohibitions of § 10 that the Supreme Court has found to foreclose the availability of obtaining a remedy under § 1983. They point out that § 12 of the Act provides criminal penalties for violations of § 10 and that § 17 directs the Department of Justice to "conduct the legal proceedings necessary to enforce the provisions of [Sec. 10]." 33 U.S.C. § 413. The defendants contend that this enforcement scheme is inconsistent with the notion that Congress intended to afford individual plaintiffs claiming injury by reason of violations of § 10 a federal right enforceable under § 1983.

IV.

A.

There is no § 1983 remedy for violation of a federal statute unless the statute creates "rights, privileges, or immunities"; the violation of every federal statute does not lead to the conclusion that § 1983 provides a remedy. *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989). In determining whether a statute creates the required rights, privileges or immunities, we look to see if it creates binding obligations on the governmental unit charged with the violation *and* whether Congress intended it to benefit the putative plaintiff. *Id.*

We conclude that, unlike the statutes at issue in *Thiboutot* and *Wilder*, there is no indication that § 10 was intended to benefit any particular person or group of

persons. We reach this conclusion by examining both the language of the Act itself and its legislative history.

The language of the Act[1] leads us to agree with the district court that the text indicates no intent by Congress to create federal rights in every person who is affected by any obstruction or other structure placed in a waterway without the required approval. Rather, the tenor of the Act indicates that its purpose was to keep the waterways open for unimpeded navigation. The Supreme Court settled this question in *Sierra Club*, stating:

> Here, the statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended

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[1] Section 10, 33 U.S.C. § 403 provides:

Sec. 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

> to further. Such language does not indicate an intent to provide for private rights of action. . . . Section 10 . . . *is the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons.*

451 U.S. at 294 (emphasis added).

The Court then briefly discussed the legislative history of the Act:

> Neither the Court of Appeals nor respondents have identified anything in the legislative history suggesting that § 10 was created for the especial benefit of a particular class. On the contrary, the legislative history supports the view that the Act was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures. In part, the Act was passed in response to this Court's decision in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888). There the Court held that there was no federal common law "which prohibits obstructions and nuisances in navigable rivers." *Id.*, at 8. . . . [T]he clear implication of the Court's opinion was that in the absence of specific legislation no party, including the Federal Government, would be empowered to take any action under federal law with respect to such obstructions. The Act was intended to enable the [Government] to take such action. Congress was not concerned with the rights of individuals.

Id. at 294-95 (footnote and citations omitted).

In summary the Court stated that in enacting § 10, "Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways." *Id.* at 296 (footnote omitted).

It is true that the Court conducted a *Cort v. Ash* analysis in *Sierra Club* for the purpose of determining whether § 10 contained an implied right of action rather than a *Wilder* analysis to determine whether § 10 creates rights, privileges and immunities making a § 1983 remedy available for a violation. This difference does not render *Sierra Club* irrelevant to our decision, as claimed by the plaintiffs. This is so because the first and most fundamental question to be answered in both determinations is the same: In enacting this statute, did Congress intend to benefit these plaintiffs? See *Wilder*, 496 U.S. at 509 (in determining whether a given statute creates a federal right enforceable under § 1983, the inquiry "turns on whether 'the provision in question was intend[ed] to benefit the putative plaintiff' "). See also, *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992) (the "most important inquiry" in determining whether a statute contains an implied right of action for private enforcement is "whether Congress intended to create the private remedy sought by the plaintiffs"). The plaintiffs did not carry their burden of demonstrating that Congress created a federal right intended to benefit individuals claiming injury from a violation of § 10.

B.

Because we have concluded that § 10 was not intended to protect individuals suffering the injuries for which the plaintiffs in this case seek damages, we need not determine whether the second *Thiboutot* exception would deny validity to their § 1983 action. *Wood v. Tompkins*, 33 F.3d at 608; *Dumas v. Kipp*, 90 F.3d 386 (9th Cir. 1996).

CONCLUSION

Having conducted the required *de novo* review of an order granting summary judgment, we find that the plaintiffs failed to demonstrate the existence of a genuine issue of material fact, and that the defendants were entitled to judgment as a matter of law. FED. R. CIV.P. 56(c). Accordingly, the judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL LOCHMAN and ELAINE LOCHMAN, individually and on behalf of KELLI LOCHMAN and KYLE LOCHMAN,

Plaintiffs,

v.

CHARLEVOIX COUNTY, and PHILO SUMNER, jointly and severally,

Defendants.
_____/

Case No. 1:95-CV-69

HON. GORDON J. QUIST

OPINION

This case arises from a tragic diving accident in which 12 year old Kelli Lochman broke her neck, rendering her a quadriplegic. Plaintiffs Carl and Elaine Lochman, individually and on behalf of their children Kelli and Kyle Lochman, brought this action against Charlevoix County and Philo Sumner, manager of Whiting Park in Charlevoix County, alleging a right of recovery for Kelli Lochman's injuries under 42 U.S.C. § 1983 based upon violations of 33 U.S.C. § 403 and the due process clause of the Fourteenth Amendment. The complaint also contains pendent claims. This matter is before the Court on defendants' motion for summary judgment.

FACTUAL BACKGROUND

The facts upon which this decision is based are undisputed. Whiting Park is a county park operated by the County of Charlevoix. Defendant Philo Sumner is the manager of Whiting Park, a position he has held since approximately 1977. The park is open to the public free of charge for use of the beach and recreational facilities. The dock involved in the incident was built in 1977 or 1978 by Mr. Sumner to replace an identical dock which had been in place since the 1950's. Each year, Mr. Sumner would place the dock in relatively the same location where the depth of the water was approximately five feet deep. The dock was made up of twelve foot sections which locked together. The dock was one hundred twenty feet long and thirty five and one-half inches wide and was shaped like an "L".

The Boyne City Swim School program, a community swim program organized by parents of the community, made use of the dock each year. Bardel Belford, the swim program instructor, would contact Mr. Sumner at the beginning of the summer to inform him when the dock would be needed for the program. Except for the hours when the swim classes were being conducted, the dock was open for public use. Mr. Sumner stated that the dock had been used for diving by both children and adults for many years.

At the beginning of the 1993 swim season, Ms. Belford asked one of her students, Nissa Ryder, to enter the water at the end of the dock to check the depth of the water. In the original location of the dock, the water

measured approximately four and one half to five feet deep, a level safe for diving.

On July 9, 1993, Belford arrived at the Park to conduct swim class and observed the dock moved by two employees of the Park. Mr. Sumner had requested that the dock be moved because the beach was eroding from the front of the dock, requiring people using the dock to step from the beach into the water and onto the dock. Upon seeing the dock moved, Ms. Belford voiced her concern to Mr. Sumner that the water in the new location would be too shallow for diving. Mr. Sumner responded with his concern that having people step from the water onto the dock would make the dock unnecessarily slippery.

Ms. Belford asked Nissa Ryder to check the depth of water at the end of the dock in the new location. Ms. Belford determined that the water at the end of the dock was too shallow for diving; the water only reached shoulder level on Nissa Ryder, who was approximately four feet five inches tall. Ms. Belford indicated that she would not have noticed that the dock had been moved had she not seen the workers moving it. Ms. Belford informed Mr. Sumner that the dock was no longer safe for diving in the new location. She asked Mr. Sumner to either extend the dock from the "L-shape" to a straight configuration into deeper water, or to place a warning sign that the dock had been moved. Mr. Sumner declined to do either. He was concerned that people running on the dock with wet feet might slip and injure themselves.

Mr. Sumner concedes that the depth of the Lake was variable due to the presence of sand bars. Mr. Sumner never made any study regarding the location of the dock

with regard to the location of the sand bars and failed to check the depth at the end of the dock in its new location. Mr. Sumner did not obtain permission from the Army Corp of Engineers to place or move the dock in violation of 33 U.S.C. § 403 of the Navigable Waters Act.

In the afternoon of July 9, 1993, Kelli Lochman, age 12, and her older brother Kyle were swimming at Whiting Park. Kelli jumped or dove off from the dock and allegedly struck her head on the lake bottom. Kelli sustained a cervical spinal cord injury, rendering her a quadriplegic. The Lochmans had been to the Park in previous years, but July 9 was the first day Kelli and Kyle had gone swimming at the Park in 1993.

DISCUSSION

§ 1983 Violation of Federal Statute 33 U.S.C. § 403

Plaintiffs argue that defendants violated 33 U.S.C. § 403, a provision of the Navigable Waters Act which prevents the creation of any structure on the navigable waters of the United States without proper authority granted by the Army Corps of Engineers.[1] Plaintiffs

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[1] 33 U.S.C. § 403 provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any . . . [structure] outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. . . .

allege that defendants moved and erected a dock, extending into Lake Charlevoix, without federal authorization as mandated by the statute. Plaintiffs seek remedy under 42 U.S.C. § 1983 which provides that any person who, under color of law, deprives any citizen of the United States of any rights, privileges, or immunities secured by the Constitution and laws shall be held liable.

The Supreme Court has established that 42 U.S.C. § 1983 encompasses claims based on purely statutory violations of federal law. *Maine v. Thiboutot*, 448 U.S. 1, 5-7, 100 S. Ct. 2502, 2504-05 (1980). The Court has subsequently created two exceptions to the general rule. "A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.' " *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508, 110 S. Ct. 2510, 2517 (1990) (citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 107 S. Ct. 766, 770 (1987)).

The Supreme Court has developed a three part test to determine whether a particular statute creates an enforceable federal right under § 1983. First, the provision in question must be intended to benefit the putative plaintiff. *Wilder*, 496 U.S. at 509, 110 S. Ct. at 2517. If the plaintiff is the intended beneficiary, the provision creates an enforceable right unless it reflects merely a congressional preference rather than a binding obligation, or unless it is so vague and amorphous as to be beyond the competence of the judiciary to enforce. *Wilder*, 496 U.S. at 509, 100 S. Ct. at 2517. *See also Horn by Parks v. Madison*

County Fiscal Court, 22 F.3d 653, 657 (6th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 199 (1994).

The Supreme Court has concluded that the test for determining the intended beneficiary of a statute is, in part, functionally the same test as that for determining whether a statute provides for a private right of action. *Suter v. Artist M.*, 503 U.S. 347, 112 S. Ct. 1360, 1370 (1992). In deciding whether a private right of action should be implied from a federal statute, the Supreme Court has adopted a four prong analysis. The first consideration of the analysis is whether the plaintiff is a member of a class for whose benefit the statute was enacted. *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2087 (1975).

Plaintiffs argue that 33 U.S.C. § 403 was intended to benefit the public at large, making all potentially harmed plaintiffs intended beneficiaries. In *California v. Sierra Club*, 451 U.S. 287, 294, 101 S. Ct. 1775, 1779 (1981), the Supreme Court held that 33 U.S.C. § 403 does not provide a private right of action. According to the Court, private parties were not the intended beneficiaries of the statute, *Sierra Club*, 451 U.S. at 294, 101 S. Ct. at 1779. The Court reasoned if any person who could be harmed by an unauthorized obstruction was the intended beneficiary of the statute, the *Cort* analysis would be meaningless. The Court found that "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *Id.* In *Sierra Club*, the Court concluded that § 403 states no more than a general proscription of activities; it does not focus on any particular beneficiaries upon whom Congress intended to confer federal benefits. Therefore, plaintiffs are not the intended beneficiaries of the statute, and 33

U.S.C. § 403 does not create for the plaintiffs an enforceable right without the meaning of § 1983.

Given that the Supreme Court in *Sierra Club* explicitly determined that potentially harmed plaintiffs were not the intended beneficiaries of the statute, plaintiffs' argument seems to be just the result the Supreme Court rejected. This Court does not believe that Congress or the Supreme Court intended that any member of the general public that is harmed in some way by a structure on a navigable waterway becomes the intended beneficiary of 33 U.S.C. § 403. Defendants' motion for summary judgment on Count I of plaintiffs' complaint will, therefore, be granted.

§ 1983 Violation of the Due Process Clause

In Counts II and III, plaintiffs allege that the County of Charlevoix and Philo Sumner, respectively, violated their substantive due process rights. Plaintiffs claim that the County of Charlevoix was deliberately indifferent to the safety of persons using Whiting County Park for swimming and diving by failing to provide adequate training to Mr. Sumner in park and water safety. Plaintiffs allege Mr. Sumner was deliberately indifferent to the safety of persons using Lake Charlevoix and grossly negligent in failing to move the dock to a safer location or to place signs indicating the depth of the water at the dock's new location.[2]

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[2] In their complaint, plaintiffs use the same facts interchangeably to advance a "deliberate indifference" and a "gross negligence" claim against the defendants. In their

The threshold requirement of a § 1983 action relates to "whether the plaintiff has been deprived of a right 'secured by the Constitution, and laws' " *Lewellen v. Metropolitan Gov't of Nashville*, 34 F.3d 345, 347 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995) (quoting *Baker v. McCollan*, 443 U.S. 137, 140, 99 S. Ct. 2689, 2692 (1979)). A plaintiff's injury must have been caused by a constitutional violation. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S. Ct. 1061, 1066 (1992).

The due process clause of the Fourteenth Amendment protects against the arbitrary exercise of governmental power and guarantees individual freedom from deliberate acts by government officials which deprive an individual of life, liberty, or property. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665 (1986).

In *Collins*, the Supreme Court established that a municipality's "deliberate indiffrence" to the safety of its employees did not constitute a violation of any constitutionally protected interest. 503 U.S. at 128, 112 S. Ct. at 1070. In *Collins*, the widow of a city sanitation department employee who died of asphyxia after entering a manhole brought a § 1983 action against the city. The plaintiff alleged that the city's deliberate indifference to her husband's safety constituted arbitrary government action in violation of the due process clause. In rejecting

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response brief, plaintiffs fail to mention upon which theory they are basing their due process claim, but instead reiterate some of the facts mentioned in the complaint. Given the case law, however, this Court does not believe that it matters which standard plaintiffs are arguing.

plaintiff's claim, the Court noted "[w]e are also not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense." *Collins*, 503 U.S. at 127, 112 S. Ct. at 1070. The Court refused to impose federal duties under the due process clause which were analogous to those imposed by state tort law.

The Sixth Circuit has expanded *Collins* by holding that even gross negligence does not establish a violation of substantive due process under § 1983. In *Lewellen*, the Court held that the defendants' deliberate disregard of a very high risk of harm to the plaintiff did not constitute a violation of the due process clause. 34 F.3d at 351. In *Lewellen*, the plaintiff, a workman who was accidentally injured on a school construction project, brought suit under § 1983. The plaintiff contended that the accident was a result of grossly negligent acts and omissions by the school board. He characterized the school board's conduct in deliberately choosing to build the school directly beneath a high voltage conductor line, in deliberately delaying removal of line, and in willfully disregarding the very high risk to workman safety created by the line as "reckless and/or undertaken with deliberate indifference to plaintiff's personal safety." *Lewellen*, 34 F.3d at 346.

Although it recognized a genuine material dispute of fact as to whether the defendants had been negligent, the Court relied on *Collins* and found that no constitutional violation had occurred as a matter of law. The Court

concluded by noting that "the injuries suffered by plaintiff Lewellen, like the death of Mr. Collins, resulted from what at worst was gross negligence. Gross negligence is not actionable under § 1983, because it is not 'arbitrary in the constitutional sense.' " *Lewellen*, 34 F.3d at 351 (quoting *Collins*, 112 S. Ct. at 1071).

A substantive due process violation requires an intentional act designed to inflict injury on the plaintiff. *Wilson v. Beebe*, 770 F.2d 578, 586 (6th Cir. 1985) (en banc); *Lewellen*, 34 F.3d at 348. Unless a defendant engages in arbitrary conduct deliberately designed to inflict injury on the plaintiff, a federal § 1983 claim is simply not triggered.

The plaintiffs allege that Mr. Sumner deliberately chose to move the dock to water of unknown depth, deliberately delayed moving the dock or posting a warning after being warned of the danger, and willfully disregarded the very high risk of injury which he created. Like the plaintiffs in *Lewellen* and *Collins*, the plaintiffs' allegations are not enough to establish a constitutional violation. Taking deliberate steps which result in death or injury to someone (e.g., driving too fast) is substantively different from acting deliberately to kill or injure someone (trying to run over a person). Kelli Lochman's injury resulted from – at worst – the gross negligence of Mr. Sumner, not Mr. Sumner's intent to injure her. Because Mr. Sumner did not intentionally subject the plaintiff to severe spinal cord injuries, the plaintiffs cannot sustain a § 1983 claim based on a violation of the due process clause. Whatever the strength of plaintiffs' claim under Michigan state tort law, plaintiffs do not have a federal

claim. Defendants' motion for summary judgment on Counts II and III of plaintiffs' complaint will be granted.

Supplemental Claims

This Court does not have original jurisdiction over the remaining claims. Instead, this Court was asked to exercise its supplemental jurisdiction under 28 U.S.C. § 1367(a). Also, from reading the Complaint and the briefs in the pending motion, it appears that the supplemental claims may require significant interpretation and analysis under Michigan law. These matters are best handled by the state courts. This Court expresses no opinion on the state law claims. Therefore, this Court will dismiss the remaining Counts IV through XII without prejudice pursuant to 28 U.S.C. § 1367(c). The parties should take note of the tolling provisions of 28 U.S.C. § 1367(d).

A separate Order will be entered.

Dated: July 18, 1995

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL LOCHMAN and ELAINE LOCHMAN, individually and on behalf of KELLI LOCHMAN and KYLE LOCHMAN,

Plaintiffs,

v.

CHARLEVOIX COUNTY, and PHILO SUMNER, jointly and severally,

Defendants.
_____/

Case No. 1:95-CV-69

HON. GORDON J. QUIST

OPINION AND ORDER

On July 18, 1995, this Court issued an Order granting defendants' motion for summary judgment. This matter is presently before the Court on Plaintiffs' Motion for Relief from Order Pursuant to Fed. R. Civ. P. 60(b)(6) and Plaintiffs' Motion for an Extension of Time to File an Appeal Pursuant to Fed. R. App. P. 4(a)(5) for Good Cause. The Court has considered these motions. The arguments made by plaintiffs have been duly considered in the Opinion previously issued by this Court. The additional discovery requested by plaintiffs would have no bearing on the Court's analysis. Accordingly,

IT IS HEREBY ORDERED that plaintiffs' Motion for Relief from Order (docket no. 19) is **DENIED.**

IT IS FURTHER ORDERED that plaintiffs' Motion for an Extension of Time (docket no. 22) is **DENIED.**

Dated: August 21, 1995

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

Counts IV, V, VI, VII, VIII, IX, X, XI, and XII are **DISMISSED WITHOUT PREJUDICE.**

IT IS FURTHER ORDERED that the hearing scheduled for July 24, 1995, at 10:00 AM is cancelled.

This case is, therefore, terminated before this Court.

Dated: July 18, 1995

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE